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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

BENNO BARTELS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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STATUTE CITED.

Subsection (s), Section 75, Bankruptcy Act, Title 11, U. S. C. A., Sec. 203 (s), Appendix "A", 1, 6, 7, 8, 10, 11, 12, 15, 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 867

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

BENNO BARTELS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

Summary Statement of Matter Involved.

This case concerns the proper construction and application of Subsection (s) of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s), relating to agricultural compositions and extensions.[1]

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[1] Printed in the appendix hereto as Appendix "A".

Upon the motion of petitioner, John Hancock Mutual Life Insurance Company, a lien creditor, the District Court dismissed the petition for composition and extension of Benno Bartels, the debtor. As a basis for the decree or order of dismissal, the District Court, after a full hearing, found: (1) that the debtor had no equity in his farm, which constituted the principal asset of his estate, and upon which the lien creditor held a mortgage; (2) that the debtor offered no definite or feasible plan for a composition and extension of his debts; (3) that there was no reasonable hope of the debtor's financial rehabilitation out of the property involved in the estate; and (4) that the debtor's petition was not filed in good faith in a bona fide attempt to effect a composition and extension of his debts (R. 106-109).

On the debtor's appeal from the order of the District Court dismissing the petition and all proceedings thereunder, the Circuit Court of Appeals for the Fifth Circuit, by a divided court, reversed the judgment and decree of the District Court.

The majority opinion of the Circuit Court of Appeals in this case, written by Circuit Judge Sibley and concurred in by Circuit Judge Hutcheson, a copy of which is appended to this petition (Appendix "B"), while not questioning the fact findings of the District Court, nevertheless, holds that the District Court was without the power to dismiss the debtor's petition and proceedings thereunder. In a dissenting opinion in this case, a copy of which is appended to this petition (Appendix "C"), Circuit Judge Holmes, expressing the view that the judgment and decree of the District Court should be affirmed, said, in part:

> "In sustaining the constitutionality of the act, the Supreme Court held that the proceeding could be maintained only as a *bona fide* effort on the part of the debtor to rehabilitate himself, and that this was

without regard to any provision of the act specifically requiring good faith. In a footnote to its opinion, it says: 'Relief under Sec. 75 (s) may be obtained only by one who has made a *bona fide* attempt, and has failed, to effect a composition under Sec. 75 (a) (r).' *Wright* v. *Vinton Branch*, 300 U. S. 440, 462. It further states that the proceedings will be halted at the outset if the debtor is beyond hope of rehabilitation. Such a pronouncement, when made the basis of a holding that an enforced delay in favor of one class of litigants for a period of three years does not violate the due-process clause of the Constitution, should not be disregarded."

* * * * * * *

"The decision of this case is unfortunate in view of our decision in *John Beverly Henderson, Debtor*, No. 8758, (100 F. (2d) 820), this day decided. The two cases were submitted at the same term of court and were considered together; but, owing to the fact that exactly the same judges did not sit in both cases, a different result is reached."

Thereafter, on petition for rehearing filed in the Circuit Court of Appeals, the majority of the court, composed of Circuit Judges Sibley and Hutcheson, adhered to its original opinion and denied a rehearing. And, upon the petition for rehearing, Circuit Judge Holmes, in a second dissenting opinion, a copy of which is appended to this petition (Appendix "D"), said in part:

"Recurring to the real question at issue, the majority opinion says that Section 75 nowhere mentions initial good faith as a prerequisite to invoking subsection (s). As to this, the note to *Wright* v. *Vinton Branch*, 300 U. S. at page 462, seems to me to be ample authority. It elaborates upon the construction of the act in the body of the opinion. Apparently the note has the full sanction of the court, and, in addition to what I have previously quoted, it says: 'It must be assumed

that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition in the outset.' That is, he could not have filed his original petition, amended under subsection (s)."

On the same day on which the Circuit Court of Appeals for the Fifth Circuit, by the majority opinion; reversed this case and held that the District Court was in error in dismissing the debtor's petition and all proceedings thereunder, the same court, in an opinion by Circuit Judge Holmes, concurred in by Circuit Judge McCord, then constituting the majority of the court, reached a different result and rendered a contrary opinion in the case of *John Beverly Henderson, Debtor,* (100 F. (2d) 820). In the *John Beverly Henderson* case, Circuit Judge Hutcheson dissented for the reasons given in the majority opinion in the *Bartels* case that day decided. Copies of the majority and dissenting opinions in the *John Beverly Henderson* case are appended to this petition. (Appendices "E" and "F"). Thus, owing to the fact that exactly the same judges did not sit in this, the *Bartels* case, and in the *Henderson* case, both of which were decided by the Circuit Court of Appeals for the Fifth Circuit on the same day, different results and judgments were reached in the two cases.

Thereafter, on March 16, 1939, the Circuit Court of Appeals for the Fifth Circuit, in the case of *Wilson, Administrator,* v. *Alliance Life Insurance Company,* (not yet officially reported), before Circuit Judges Sibley, Holmes, and McCord, in an opinion by Circuit Judge Holmes, then of the majority, affirmed the judgment of the District Court dismissing the debtor's petition and all proceedings thereunder. And, in that case, Circuit Judge Sibley, who had theretofore been of the majority in this, the *Bartels* case,

wrote a minority opinion adhering to the views originally expressed by him in this, the *Bartels* case. Copies of both of the opinions in *Wilson, Administrator*, v. *Alliance Life Insurance Company* are appended to this petition. (Appendices "G" and "H"). In *Wilson, Administrator*, v. *Alliance Life Insurance Company, supra*, Circuit Judge Holmes, speaking for the majority, said, in part:

> "Accepting the finding that the order was not made in good faith and that there is no reasonable hope of rehabilitation, as we must on this appeal, appellant's contention is reduced to the proposition that the district court was without authority to set aside the adjudication and dismiss the proceeding, but was bound to continue the stay provided for or to liquidate according to the procedure and subject to the limitations provided for in the act. Following what we conceive to be the correct interpretation of the case of *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, we have held that good faith and a reasonable hope of rehabilitation in the proceedings leading to, as well as in making, the offer of composition and extension under Section 75 of the act (11 U. S. C. A. 203 (a)-(r) are necessary prerequisites to the benefits provided under subsection (s) (11 U. S. C. A. 203 (s)). *Baxter* v. *Savings Bank of Utica, supra*, 92 F. (2d), 404, 406; *In re John Beverly Henderson*, 100 F. (2d) 820."

Thus, this is a petition for writ of certiorari to review a judgment and decree of the Circuit Court of Appeals for the Fifth Circuit, rendered by a divided court, in direct conflict with a decision (also, by a divided court), in a similar case decided by the same court on the same day, and, likewise, in direct conflict with a decision of the same court, rendered shortly thereafter in a similar case, where the conflicts in each of the three similar cases, as pointedly stated in the majority and dissenting opinions, copies of all

of which are appended to this petition, arise upon the interpretation, construction, and application of Subsection (s) of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s), as previously construed and interpreted by the Supreme Court of the United States in *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 57 S. Sup. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455. The conflicts are irreconcilable. In this, the *Bartels* case, the decision of the majority, *as then constituted*, is not in accord with the decision of the Supreme Court in *Wright* v. *Vinton Bank* (*supra*); in the two cases, of *John Beverly Henderson*, and *Wilson, Administrator*, v. *Alliance Life Insurance Company*, the decision of the majority, *as then constituted*, is in accord with the decision of the Supreme Court of the United States in *Wright* v. *Vinton Bank, supra*.

Statement Showing Basis of Jurisdiction.

Petitioner presents the following grounds as the basis upon which it is contended that the Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case:

1. The majority opinion and decision of the Circuit Court of Appeals in this case reflects a most unusual division of opinion and conflict among four judges of the Circuit Court of Appeals for the Fifth Circuit, as shown in the majority and dissenting opinions in this case and in other similar cases decided by that court at about the same time, namely: *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404, *In re John Beverly Henderson*, 100 F. (2d) 280, *Wilson, Administrator*, v. *Alliance Life Insurance Company*, decided on March 16, 1939 (not yet officially reported); and such division of opinion and conflict within the Circuit Court of Appeals for the Fifth Circuit calls for an exercise of the Supreme Court's power of supervision.

2. The majority opinion and decision of the Circuit Court of Appeals in this case is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 81 L. Ed. 736, 743, 112 A. L. R. 1455.

3. The majority opinion and decision of the Circuit Court of Appeals in this case is in direct conflict with the decisions of other Circuit Courts of Appeal, upon the same questions involved in this case, in the following cases, among others, namely:

In re Borgelt (Seventh Circuit), 79 F. (2d) 929.

Helbstab v. *Equitable Life Assur. Soc.* (Tenth Circuit), 91 F. (2d) 655, 659.

Pearce v. *Coller* (Third Circuit), 92 F. (2d) 237 (certiorari denied).

In re Coleman (Sixth Circuit), 93 F. (2d) 1001, C. C. A. (1938).

Massey v. *Farmers & Merchants Bank* (Fourth Circuit), 94 F. (2d) 526 (1938).

4. The majority opinion and decision of the Circuit Court of Appeals in this case has misconstrued and misapplied a Federal statute, to wit: Section 75 (s) of the Bankruptcy Act as amended (11 U. S. C. A., Sec. 203 (s)).

5. The petitioner, by the construction and application given by the majority opinion and decision of the Circuit Court of Appeals in this case to Section 75 (s) of the Bankruptcy Act, as amended, has been deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

6. The Circuit Court of Appeals, by the majority opinion and decision in this case, has erroneously failed to give effect to fact findings of the District Court, which are not questioned, criticized, or rejected by the Circuit Court of

Appeals, and which are amply supported by evidence in the record.

The Questions Presented.

In the interest of brevity (Rule 38, paragraph 2), petitioner does not at this time set forth all of the points which will be urged at the argument on the merits of this cause, should the writ be granted, nor all of the contentions in support of such points. But, in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari, petitioner here refers to and incorporates into this petition all of the questions raised and the matters presented in its brief and in its petition for rehearing filed in the Circuit Court of Appeals, with the same force and effect as if herein set out in full.

The petitioner represents that the principal question involved in this case and presented by this petition for writ of certiorari is as follows:

Where, under the accepted findings of the District Court, the debtor had no equity in his farm, the debtor offered no feasible plan of composition and extension, there was no hope of the debtor's financial rehabilitation, and the debtor's petition was not filed in good faith, was the District Court authorized to dismiss the debtor's petition and proceedings under Subsection (s), of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Sec. 203 (s)?

Reasons Relied upon for the Allowance of the Writ.

This case presents questions of great importance. It requires, petitioner submits, the allowance of a writ of certiorari for the following reasons:

First.

The writ of certiorari should be allowed in this case, because, as petitioner represents with great deference and

respect, there exists between the decision of the Circuit Court of Appeals for the Fifth Circuit in this, the *Bartels* case, in the decision by the same court in the *John Beverly Henderson* case decided on the same day, in the decision by the same court in *Wilson, Administrator,* v. *Alliance Life Insurance Company,* decided on March 16, 1939, and in a prior decision by the same court in *Baxter* v. *Savings Bank of Utica,* 92 F. (2d) 404, a most unusual and unseemly conflict of opinion among four judges of that court, namely, Circuit Judges Sibley, Holmes, Hutcheson, and McCord. Copies of the majority and dissenting opinions in this, the *Bartels* case, in the *John Beverly Henderson* case, and in the case of *Wilson, Administrator,* v. *Alliance Life Insurance Company,* appended to this petition, and a reference to the *Baxter* case, *supra,* illustrate the existing contrariety of opinion existing among those four eminent circuit judges. The majority and dissenting opinions in these cases demonstrate, far better than any elaboration which petitioner might here make, the unfortunate conflict of opinion existing in the Circuit Court of Appeals for the Fifth Circuit. With the utmost respect, it is not inaccurate for petitioner to say that an affirmation or a reversal of this, the *Bartels* case, and of other similar cases involving identical questions, is made to turn and depend upon the circumstance as to how the membership of the court of three judges may be constituted with respect to the majority or the minority view. That is, the opinions in the cases mentioned demonstrate, without need of further statement here, that, among the four circuit judges mentioned, there is an equal division of opinion as concerns a correct decision of the questions involved in this the *Bartels* case, in that two of the circuit judges entertained the opinion that the judgment of the trial court should be affirmed, while the other two of the circuit judges entertained the opinion that the decision of the trial court should be reversed.

Second.

The writ of certiorari should be allowed in this case, because the decision of the Circuit Court of Appeals in this case is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736-745, 112 A. L. R. 1455, wherein the Supreme Court of the United States has distinctly held: (1) that "Relief under Section 75 (s) (Bankruptcy Act as amended, 11 U. S. C. A.), Sec. 203 (s), may be obtained only by one who has made a *bona fide* attempt, and has failed, to effect a composition under Section 75 (a)-(r) (Bankruptcy Act as amended); (2) that a debtor's proceeding under Section 75 of the Bankruptcy Act "will be halted at the outset" if the debtor is beyond all reasonable hope of financial rehabilitation; and (3) that, without regard to any provision of the Act (Section 75 of the Bankruptcy Act, 11 U. S. C. A.), or any specific requirement that the debtor's petition be made in good faith, nevertheless, good faith on the part of the petitioning debtor is required.

The majority opinion of the Circuit Court of Appeals in this, the *Bartels* case, holds that the language of Justice Brandeis of the Supreme Court of the United States, appearing in the footnote to the opinion of the Court, delivered in the case of *Wright* v. *Vinton Branch Bank, supra*, constitutes no part of the opinion of the Supreme Court in that case, and, thereupon, the majority of the Circuit Court of Appeals declines to follow such language. In the dissenting opinion of Circuit Judge Holmes in this case, it is recognized that the language in the footnote of Justice Brandeis in *Wright* v. *Vinton Branch Bank, supra*, does constitute a controlling part of the opinion of the Supreme Court in that case. The majority opinion in this case is, therefore, directly in conflict with the holding of the Su-

preme Court of the United States in the case of *Wright* v. *Vinton Branch Bank, supra,* in the three respects pointed out.

Third.

The writ of certiorari should be allowed in this case, because the decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of other Circuit Courts of Appeals, namely: *In re Borgelt* (Seventh Circuit), 79 F. (2d) 929; *Helbstab* v. *Equitable Life Assur. Soc.* (Tenth Circuit), 91 F. (2d) 655-659; *Pearce* v. *Coller* (Third Circuit), 92 F. (2d) 237 (certiorari denied); *In re Coleman,* 93 F. (2d) 1001 (C. C. A.) (1938); *Massey* v. *Farmers & Merchants Bank* (Fourth Circuit), 94 F. (2d) 526 (1938). It is distinctly held in these five cases, decided by other Circuit Courts of Appeals, that a debtor's petition for composition and extension under Subsections (a)-(r), of Section 75 of the Bankruptcy Act, must, in the first instance, be filed in good faith in *a bona fide* effort to obtain a composition and extension, that some feasible plan of composition and extension must be offered by the debtor to his creditors, that the debtor must have an equity in the estate over and above his lien debts, and that there must be a reasonable hope of financial rehabilitation for the debtor. These elements being absent, it is held in the foregoing cases decided by other Circuit Courts of Appeals that the debtor's petition and all proceedings thereunder should be dismissed.

Fourth.

The writ of certiorari should be allowed in this case, because the decision of the Circuit Court of Appeals in this case, by the majority opinion, has misconstrued and misapplied Section 75 (s) of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 203 (s)), in that the court's construc-

tion, interpretation, and application of the statute is in direct conflict with a prior construction, interpretation, and application of said statute, as made by the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S., 440-462, 57 Sup. Ct. 556, 81 L. Ed. 736, 743, 112 A. L. R. 1455.

Fifth.

The writ of certiorari should be allowed in this case, because the Circuit Court of Appeals in this case, by the majority opinion, has misconstrued, misinterpreted, and misapplied Section 75 (s) of the Bankruptcy Act, as amended (11 U. S. C. A., 205 (s)), so as to deny to this petitioner, John Hancock Mutual Life Insurance Company, due process of law and to deprive it of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that petitioner will be postponed and delayed, to its great detriment and loss, in the collection and enforcement of its debt and lien where, according to the accepted findings of the trial court, the debtor had no equity in his farm, the debtor proposed no feasible plan for composition and extension, there was no reasonable hope of the debtor's financial rehabilitation, and the debtor's petition was not filed in good faith in a *bona fide* effort to obtain a composition and extension of his debts.

Sixth.

The writ of certiorari should be allowed in this case, because the decision of the Circuit Court of Appeals in this case, by the majority opinion, has erroneously failed to give effect to the accepted fact findings of the District Court, which are amply supported by evidence in the record, namely: (1) that the debtor had no equity in his farm, which constituted the principal asset of his estate,

and upon which the lien creditor held a mortgage; (2) that the debtor offered no definite or feasible plan for a composition and extension of his debts; (3) that there was no reasonable hope of the debtor's financial rehabilitation out of the property involved in the estate; and, (4) that the debtor's petition was not filed in good faith in a *bona fide* attempt to effect a composition and extension of his debts.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; that the decree of the United States Circuit Court of Appeals for the Fifth Circuit, whereby the judgment of the District Court was reversed, be reversed by this Honorable Court; that the judgment and decree of the District Court be in all things affirmed; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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Counsel for Petitioner,
San Antonio, Texas.

BYRON K. ELLIOTT,
Boston, Massachusetts,
Of Counsel.

I, John H. Bickett, Jr., do hereby certify that I have examined the foregoing petition for writ of certiorari,

and that, in my opinion, the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one, and is such, that the prayer of the petition should be granted by this Honorable Court.

JOHN H. BICKETT, JR.

Subscribed and sworn to before me this 22nd day of March, A. D. 1939.

MRS. ANNA BELLE FRITCH,
[SEAL.] *Notary Public, Dallas County, Texas.*

BRIEF OF ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Reference is here made to the summary statement of matter involved, contained in the foregoing petition for writ of certiorari, as a sufficient preliminary statement of the nature of this case (Petition, pp. 1-6).

Specification of Errors.

The errors in the judgment of the Circuit Court of Appeals for the Fifth Circuit in this case may be appropriately combined into one comprehensive specification of error, which petitioner submits in this brief in support of its petition for writ of certiorari, as follows:

The decision and judgment of the Circuit Court of Appeals in this case, whereby the judgment of the District Court, dismissing the debtor's petition and all proceedings thereunder, was reversed and the case was ordered re-instated for further proceedings, is erroneous, because such decision and judgment is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736, 743, 112 A. L. R. 1455, wherein the Supreme Court has distinctly held: (1) that "Relief under Section 75 (s) (Bankruptcy Act as amended, 11 U. S. C. A., Sec. 203 (s)), may be obtained only by one who has made a *bona fide* attempt, and has failed, to effect a composition under Section 75 (a)-(r) (Bankruptcy Act as amended)"; (2) that a debtor's proceeding under Section 75 of the Bankruptcy Act "will be halted at the outset" if the debtor is beyond all reasonable hope of financial rehabilitation;

and (3) that, without regard to any provision of the Act (Section 75 of the Bankruptcy Act, 11 U. S. C. A.), or any specific requirement that the debtor's petition be made in good faith, nevertheless, good faith on the part of the petitioning debtor is required.

Statement and Argument.

The findings of the District Court, referred to in the petition for writ of certiorari, as the basis for the decree of dismissal, are not questioned in either the majority opinion or in the two dissenting opinions in this case.

The District Court, in findings which appear in the transcript of the record, said:

> "The Court fully realizes that it ought not to apply emergency prices to a matter of this kind or foreclose the possibility of rehabilitation on the theory that immediate liquidation could not be had. However, there is nothing here to indicate to the Court that there is any reasonable probability of this property being sold for enough to give any substantial equity at all to the debtor. The charges are mounting rapidly and any equity that may exist will be wiped out" (R. 107).

The farm owned by the debtor, Bartels, on which John Hancock Mutual Life Insurance Company held a first and superior lien, contained one hundred acres of land situated in Guadalupe County, Texas, with improvements thereon. The lien indebtedness calculated up to March 23, 1938, amounted to $8,195.37 (R. 8-9). For the purpose of making a loan on the land, the Federal Land Bank fixed the loan value at $54.00 per acre, and the sum of $5,400.00 was the highest amount that the Federal Land Bank would lend on the land (R. 29). A disinterested witness, Wm. F. Schutz, a real estate man who has dealt extensively in farms and real estate, testified: that the debtor's farm land was worth $40.00 per acre, and the improvements were

worth $2,000.00, making a total valuation of $6,000.00—an amount considerably less than the existing lien debt held by John Hancock Mutual Life Insurance Company (R. 94).

The record further shows that from fifteen to twenty-five acres of the debtor's farm is subject to overflow from a creek or a "draw." The total amount of the cultivated land on the place was 85 acres (R. 30).

It was shown that, within the last three or four years, the debtor has realized as revenue from the farm about $300.00 or $400.00 a year, whereas, annual interest alone on the lien debt amounted to $390.00 (R. 8-24).

The District Court found that the debtor, Bartels, had no definite plan or proposal to make to his creditors for a composition and extension of his debts; and, in that connection, the court quoted the following questions and answers from the record:

> "Q. Do you have any plan or proposal to submit to your creditors, Mr. Bartels, as a composition or extension of your debts in these proceedings?"
>
> "A. No. I want to pay everybody that I owe, sure."
>
> "Q. You don't have any definite, concrete plan now, do you?"
>
> "A. No, not exactly, but I want to pay everybody I owe."
>
> "Q. How are you going to raise the money to farm the land this coming year? Can you tell us how you are going to raise the money to farm it?"
>
> "A. I will just have to get out and make a little" (R. 102).

The District Court, also, found that there was no reasonable hope of the debtor's rehabilitation; and, in such finding, the court used the following language:

> "Accordingly, the court finds that there is no reasonable probability of the financial rehabilitation of this debtor" (R. 107).

The debtor, Bartels, owned the one hundred acre farm on which the petitioner, John Hancock Mutual Life Insurance Company, holds a first lien securing an indebtedness now aggregating approximately $9,000.00; and he owned two vacant lots, purchased some twenty years ago, situated in the Mexican section of San Antonio, which lots he had never seen and for which lots he had been unable to obtain any purchase offer. He owned one horse and one milk cow. He owned a tractor which was mortgaged for $500.00 and on which a $250.00 installment payment was past due. He owned an undivided interest in a small stock of groceries of the estimated value of $250.00, which interest he had contracted to sell but has not yet sold. He had no money on hand; and he knew of no place where he could borrow any money. In addition to his lien indebtedness on the farm, he owed unsecured debts aggregating $2,100.00, and those debts were past due. His testimony showed that, over a period of several years, he had been unable to produce from the farm enough revenue to pay interest and taxes thereon, not taking into account his living expenses (R. 16-19).

In this connection, the District Court said:

> "It is purely speculative as to what can be made on this farm, and we have no better light by which we can guide our feet than the lamp of experience. For a number of years, this farm has not paid any such fanciful returns as some of the witnesses seem to think it should; it has been shown that within the last three or four years, he has not realized more than $300.00 or $400.00 from it. Of course, it has been testified that was because he did not farm it personally; that he has been in bad health. We have no assurance here that conditions in the future will be better than in the past. Assuming that he did make $300.00 to $400.00 from the farm, it would take that much to pay the current interest without making any payments on past due interest. Then we have the matter of operating expenses, living expenses and taxes to be considered" (R. 106-107).

In the case of *Wright* v. *Mountain Trust Bank, supra,* Justice Brandeis, speaking for the Supreme Court of the United States, said:

> "It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset."

Now, in this case, it was amply shown by the record of the proceedings at the first meeting of creditors before the Conciliation Commissioner, and, again, demonstrated in the full hearing before the District Court, that the debtor's financial condition generally was such that there could be no reasonable hope or expectation for his rehabilitation. Indeed, the record shows that this man's financial affairs could not be worked out; that his debts and liabilities far exceeded his assets; and that he was utterly and hopelessly insolvent. In such a situation, delay and postponement in the matter of permitting the creditor to foreclose its lien could only result in loss and detriment to the creditor, with no resulting benefit to the debtor. As well said by the District Court:

> "The debtor's situation was such that there was no reason to believe that he could be rehabilitated, and the bringing of the matter here was simply to postpone the evil day and increase the amount of his indebtedness without accomplishing any good to himself or to his creditors" (R. 99).

Conclusion.

Accordingly, it is the contention of petitioner that the District Court rendered the correct judgment and decree in this case in dismissing the debtor's petition and all proceedings thereunder, that the judgment and decision of the Circuit Court of Appeals for the Fifth Circuit, reversing the judgment and decree of the District Court, is erroneous

for the reasons pointed out in the foregoing brief, and that, for each and all of the reasons set forth in the foregoing petition for writ of certiorari, this Honorable Court should allow the writ of certiorari in this case.

WHEREFORE petitioner prays that its petition for writ of certiorari be allowed by this Honorable Court.

Respectfully submitted,

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APPENDIX TO PETITION FOR CERTIORARI.

Appendix "A".

Sub-Section(s), Section 75 of the Bankruptcy Act as Amended, (Title 11, U. S. C. A., Section 203(s)).

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall re-

main in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.

(4) The conciliation commissioner, appointed under subsection (a) of this section, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of this subsection, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of admin-

istration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under this subsection, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under this section shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this title. The provisions of this title shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

(5) This title shall be held to apply to all existing cases now pending in any Federal court, under this title, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under this title may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this title shall not be grounds for denying him the benefits of this section.

(6) This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate. (July 1, 1898, c. 541, Sec. 75; Mar. 3, 1933, c. 204, Sec. 1, 47 Stat. 1470; June 7, 1934, c. 424, Secs. 8, 9, 48 Stat. 925; June 28, 1934, c. 869, 48 Stat. 1289; May 15, 1935, c. 114, Sec. 3, 49 Stat. 246; Aug. 28, 1935, c. 792, Secs. 1-6, 49 Stat. 942-945.)

Appendix "B".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8868.

BENNO BARTELS, *Appellant*,

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., *Appellees.*

Appeal from the District Court of the United States for the Western District of Texas.

(December 22, 1938.)

Before Sibley, Hutcheson and Holmes, Circuit Judges.

SIBLEY, *Circuit Judge:*

The case concerns the proper application of Subsection (s) of Sect. 75 of the Bankruptcy Act, 11 U. S. C. A. Sect. 203(s). Benno Bartels as a farmer applied for a composition and extension of his debts and his petition was approved and referred to the Conciliator. At the creditors' meeting Bartels expressed a willingness to pay in full if given time, and proposed to work his farm himself and to apply the proceeds of the crops to his debts, selling and paying over at once property not needed on the farm. Theretofore he had let it out on shares because he had hurt his back, and poor crops had been made. He came to an agreement with his unsecured creditors but John Hancock Mutual Life Insurance Company held a mortgage on the farm for $6,000 principal, interest on which was three years in arrears, and this debt was a majority in amount of all his debts. This creditor required present payment of all arrearages, and since Bartels could not arrange cash therefor he could make no acceptable proposal. He then amended his petition and prayed to be adjudged a bankrupt under Subsection (s). On Jany. 10, 1938, he was so

adjudged and the case re-referred to the Conciliator as referee. Bartels appears to have continued in possession of the farm, but under what terms does not appear. About ten weeks later the Insurance Company moved, not to have its security sold, but that the adjudication in bankruptcy be set aside and all proceedings dismissed. The bankrupt resisted this. On a hearing the judge held there was no reasonable probability of the mortgaged property being sold for enough to give the debtor any substantial equity, and that accordingly there was no reasonable probability of his financial rehabilitation. The motion was granted, the adjudication set aside and the cause dismissed, largely on the authority of our decision in *Baxter* v. *Savings Bank of Utica*, 92 Fed. (2) 404. Other decisions from the Circuit Court of Appeals cited to support the judgment are: *In re Borgelt*, 79 Fed. (2) 929, approving and affirming 10 Fed. Supp. 113; *Knotts* v. *First Carolinas Joint Stock Land Bank*, 86 Fed. (2) 551; and *Massey* v. *Farmers & Merchants Bank*, 94 Fed. (2) 526. Of these the first rested on two grounds, that the debtor had not made a good faith offer, and there were no assets to be administered. The second was really decided on the erroneous ground that Subsection (s) was unconstitutional. The third squarely took the position that Subsection (s) cannot be invoked unless the initial offer made to creditors has come up to certain rather vague standards which would show good faith.

Confusion has arisen, we think, touching the way in which Subsection (s) fits into the scheme of bankruptcy, as to when the stay provided therein may be denied, and how security holders are to have their rights preserved. Farmers were favored in the original Bankruptcy Act in that while they might voluntarily go into bankruptcy, they could not be forced in. This is continued in proceedings under Section 74(1) 11 U. S. C. A. Sect. 202(1). Section 75 deals only with farmers, and as stated at its end (Subsection (s) (6)) is emergency legislation, limited originally to five years, and not to be applied where the judge finds no emergency to exist locally. The emergency was the great economic depression which in 1933 had rendered farming unprofitable, and farm lands unsalable for their normal

value. To force the sale of farms under such circumstances would be a hardship on the farmer who on a basis of normal values was really solvent, and would cause those who were insolvent to lose their means of livelihood, and probably in great numbers go to swell the ranks of the unemployed and those needing public relief. The surplus value inherent in the farms would, after economic revival, accrue to speculative buyers, and aggravate the social evil of the rich becoming ever richer and the poor poorer. Creditors as a rule do not wish farms, and would under safe arrangements prefer to extend time or to compromise their debts, if it would enable their farmer debtor to continue in business and pay them. Section 75 is intended to serve all these interests while seeking mainly to help distressed farmers so far as that may rightly be done. Its benefits are expressly extended both to those who cannot meet their debts as they mature but are solvent in a bankruptcy sense, and to those who are insolvent. Subsection (c).

The applicant under Section 75 is at first not a bankrupt, but a debtor. The aid of the court is first extended to secure a voluntary adjustment with his creditors, both secured and unsecured, which will enable him to continue to farm, the will of a majority in number and amount controlling the minority. If this adjustment cannot be accomplished, the farmer may wholly drop the matter, or he may turn to Subsection (s) and "amend his petition, asking to be adjudged a bankrupt." When so adjudged he becomes a bankrupt under the bankruptcy law, required to surrender his property except exemptions, and entitled to ask a discharge from his debts. But Subsection (s) introduces for a farmer who timely invokes it very important changes in the applicable bankruptcy law. Instead of immediately surrendering his property, and especially his farm and equipment, he may retain them, or so much as he requests, for three years, paying a reasonable rent for them, and may even at the appraised value redeem them on terms fixed by the court, the redemption money then becoming part of the estate to be distributed in bankruptcy in place of the property itself. All this, as respects unsecured creditors, has been considered to be within the bankruptcy

power of the federal government. But secured creditors whose liens antedate the law have as to their security vested rights which must be effectuated. The present Subsection (s) has been construed as sufficiently flexible to care for them. *Wright* v. *Vinton Branch Bank*, 300 U. S. 440. A creditor with a mortgage on the farm may be able to force a sale which will defeat a rehabilitation of the farmer which might otherwise have been accomplished. And, although there be no secured debts, or they are not urgently pressed, rehabilitation may appear to be impracticable, or pending it the farmer may breach his obligations, and then ordinary bankruptcy procedure may be ordered to go forward as Subsection (s) (3) declares. In neither case under a proper construction of Section 75 is the entire proceeding to be dismissed. On the contrary, when the rehabilitation sought by Subsection (s) fails, the farmer is still a bankrupt, and his estate is to be administered and his debts discharged as in other cases of voluntary bankruptcy. "In proceedings under this Section (Section 75) except as otherwise provided therein, the jurisdiction and powers of the court, the title powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer, and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition asking to be adjudged a bankrupt was filed with the clerk. * * * " Subsection (n). Much more is the general bankruptcy law to be applied after an adjudication as a bankrupt has been actually made under Subsection (s). The only mention of dismissing the proceedings which we find is in Subsection (1), when a composition has been carried out, or optionally when an extension proposal has been confirmed.

The courts have spoken of a lack of "good faith" in invoking Section 75 as a cause for dismissing the whole proceeding, and some countenance has been given the idea in a foot-note to the opinion in the case of *Wright* v. *Vinton Bank, supra.* We do not understand it to be a part of the court's opinion. The note mistakenly states that good faith

is made a requirement of the initiation of a proceeding under Sect. 75. That requirement appears in Sect. 74(a). Section 75 nowhere mentions initial "good faith" as a prerequisite to invoking Subsection (s), or going through bankruptcy if rehabilitation under that Subsection fails. The good faith of the offer and acceptance is to be enquired into by the court before confirming a composition or extension accepted by the majority of creditors, Subsection (i), and that is the only mention of good faith in Sect. 75. If the farmer is desirous of continuing to farm and is willing to give his creditors their full rights in his property as the law fixes them hoping to obtain from them such extension or compromise as will enable him to work out, that we think is all the good faith necessary. That he has no equity in his property but is actually insolvent is no bar. The statute says so in Subsection (c). That his creditors refuse to compromise or give time so as to enable him to farm, merely gives him the right to proceed in bankruptcy under Subsection (s) and thus to try conclusions with the judge. That Bartels in this case had no plan to present to his creditors except to offer to go to work personally on the farm with his grown son, and apply presently to his secured debt what he could raise by selling some mercantile property and vacant lots, hoping to pay all in full finally, does not require the dismissal of his proceedings. His unsecured creditors were actually content to adopt the plan. The secured creditor whose debt was a majority in amount was not content. Bartels thereupon rightly asked adjudication as a bankrupt, invoking Subsection (s). His secured creditor had the right thereafter to ask the court for a sale or other disposition of the security, if the delay and rentals fixed under Subsection (s) would impair his vested rights. This he did not do. He had no right to set aside the adjudication and dismiss the proceeding. If there is no substantial equity, actual or potential, above the mortgage debt reasonably to be saved, a sale of the farm may be ordered, defeating of course rehabilitation, but the adjudication would stand and administration in bankruptcy continue. It was error in this case to set aside the adjudication and dismiss the proceedings.

What we said about Subsection (s) in *Dallas Land Bank* v. *Davis*, 83 Fed. (2) 322, we see no occasion to modify. In *Baxter* v. *Savings Bank of Utica*, 92 F. (2) 404, the disposition of the case was correct, but some of the language touching initial good faith as a prerequisite to invoking Subsection (s) and indicating that the adjudication under Subsection (s) should have been set aside to make way for another adjudication we now think was inaccurate. The adjudication under Subsection (s) is good if the farmer never makes any application to retain possession of his property and for its appraisal and a stay of all other proceedings. The language of the statute shows that such application is optional, and the option may be lost by failure to assert it at the times the statute names. "Such farmer may, at the same time, or at the time of the first hearing, petition the court that all his property • • • be appraised, etc." If no such petition is made, or if later the benefits of possession and stay are defeated, the adjudication stands as a voluntary adjudication in bankruptcy. Appropriate proceedings ought to follow.

The judgment rendered on the motion of the Insurance Company is reversed and the case ordered reinstated for further proceedings not inconsistent with this opinion.

Appendix "C".

HOLMES, *Circuit Judge*, dissenting:

The district court found that there was no reasonable hope of appellant rehabilitating himself with the property involved in this estate, and that the petition was not filed in good faith. The record amply supports this finding, and the majority opinion does not question it. Nevertheless, the majority opinion holds that the court was without power to dismiss the proceedings.

In sustaining the constitutionality of the act, the Supreme Court held that the proceeding could be maintained only as a bona fide effort on the part of the debtor to rehabilitate himself, and that this was without regard to any pro-

vision of the act specifically requiring good faith. In a foot-note to its opinion, it says: "Relief under Sec. 75 (S) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Sec. 75 (a) (r)". *Wright* v. *Vinton Branch*, 300 U. S. 440, 462. It further states that the proceedings will be halted at the outset if the debtor is beyond hope of rehabilitation. Such a pronouncement, when made the basis for a holding that an enforced delay in favor of one class of litigants for a period of three years does not violate the due-process clause of the Constitution, should not be disregarded.

Good faith has been defined as lack of pretense. A proceeding such as this, without hope of rehabilitation, is a mere pretense. The majority says that, because there is a field of judicial action within which the court may move and act, the power to withhold its process in aid of a pretense is denied to it, and that, as a mere ministerial functionary, it must proceed only upon such motions and petitions as are expressly provided for in the act. This is not within the usual concept of a judicial tribunal. The Supreme Court held otherwise, and pointed out that the practical administration of the section in the lower courts already gave ample evidence of substantial protection to creditors. For these reasons, I think the judgment of the district court should be affirmed.

The decision of this case is unfortunate in view of our decision in *John Beverly Henderson, Debtor*, No. 8758, this day decided. The two cases were submitted at the same term of court and were considered together; but, owing to the fact that exactly the same judges did not sit in both cases, a different result is reached.

Appendix "D".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8868

BENNO BARTELS, *Appellant*,

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Western District of Texas.

(January 23, 1939.)

Before Sibley, Hutcheson and Holmes, Circuit Judges.

By the COURT:

It is Ordered that the petition for rehearing in the above numbered and entitled cause be, and it is hereby denied.

Holmes, Circuit Judge, dissents.

HOLMES, *Circuit Judge*, dissenting:

I think the petition should be granted. The point of disagreement between us is not whether appellant is entitled to be adjudged a bankrupt. That was decided in *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404, which apparently is approved by three of the five judges of this circuit, and which is in accord with *Massey* v. *Farmers & Merchants National Bank & Trust Company*, 94 F. (2d) 526, wherein certiorari was applied for by eminent counsel, and the application was afterward withdrawn prior to a ruling thereon by the Supreme Court. 303 U. S. 665.

The real question at issue in this case is whether appellant is entitled to petition the court to allow him to retain possession of his property for a period of three years, during which it shall stay all judicial proceedings in any

court, or under the direction of any official, against the debtor or any of his property; and whether he is entitled to invoke the other jurisdictional provisions of Section 75 (s) of the Bankruptcy Act.

No one denies that a farmer may become a voluntary bankrupt or that he may not be forced to become an involuntary one. Appellant has not petitioned for an adjudication as an ordinary bankrupt. There is nothing in the evidence to indicate that he desires any status in the bankruptcy court except that provided by subsection (s). If he does, no one may object, but he should not be entrapped, when he is seeking special relief under emergency legislation. This was the effect of our holding in the Baxter case, in which no application for certiorari was made.

The question is, shall a debtor who prays for the beneficent provisions of subsection (s) be dealt with, under Section 22 of the Act, as an ordinary voluntary bankrupt? The majority opinion says: "If there is no substantial equity, actual or potential, above the mortgage debt reasonably to be saved, a sale of the farm may be ordered, defeating of course rehabilitation, but the adjudication would stand and administration in bankruptcy continue"; but it does not say whether the administration should continue under subsection (s) or as in ordinary bankruptcy. The distinction is important, as will appear from the legal requirements of administration.

It is fundamental that adjudication fixes the status both of the bankrupt and of his property as of the date when the petition for adjudication was filed. An ordinary adjudication divests rights of the bankrupt and fixes rights of creditors, but under subsection (s), it leaves the substantive rights of bankrupt and creditors unimpaired, and provides a procedure for the enforcement of both. The distinction between the latter procedure and that in ordinary bankruptcy is, from the debtor's point of view, very marked. When the petition is not filed in good faith, fairness, as well as the statute, requires the proceedings to be dismissed, rather than to hold the petitioner as an ordinary bankrupt, and, denying a stay, to sell his property without any equity of redemption. *Sheets* v. *Livy*, 99 F. (2d) 917.

Recurring to the real question at issue, the majority opinion says that Section 75 nowhere mentions initial good faith as a prerequisite to invoking subsection (s). As to this, the note to *Wright* v. *Vinton Branch*, 300 U. S. at page 462, seems to me to be ample authority. It elaborates upon the construction of the act in the body of the opinion. Apparently the note has the full sanction of the court, and, in addition to what I have previously quoted, it says: "It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition in the outset." That is, he could not have filed his original petition, amended under subsection (s).

The holding which seems to me to be clearly untenable is that an amendment, not of the averments but of the prayer of the petition, supplies a constituent element essential to confer the additional jurisdiction for relief of debtors which was the primary object of the original petition. Having made good faith essential to the filing of the original petition, it was unnecessary to repeat the requirement in the provision for the amendment. Referring to the petition, an amendment of which is the subject of our disagreement, the statute provides as follows: "Upon the filing of such a petition or answer the judge shall enter an order approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it." 11 U. S. C. A. 202 (a).

The above quoted sentence is from section 74 (a), which applies to any person, except a corporation, seeking a composition or extension of his debts. Appellant is a person and not a corporation; therefore, it includes him; but he belongs to a particular class of persons, which is further dealt with in Section 75. He is a farmer, and when the latter seeks a composition or extension of his debts, additional jurisdiction is conferred on the bankruptcy court, but the general requirement that the petition must be filed in good faith is not relaxed. This is put beyond doubt by subsection (i) which provides: "The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of

financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted."

When these statutory provisions are rounded out by the constitutional construction of Section 75(s) in *Wright* v. *Vinton Branch, supra,* and particularly by note 6 to the opinion of the court in that case, the court below was fully warranted in its dismissal of the proceeding, because there was no hope of rehabilitation and the amended petition was not filed in good faith.

Merely as a person, a farmer may file a petition under section 74, seeking a composition or extension of his debts; he may amend it by alleging that he is a farmer and bring the proceeding within the additional jurisdiction granted under Section 75; and failing to reach an agreement with his creditors, he may amend the prayer of his petition and ask to be adjudged a bankrupt under Section 75 (s), wherein still further powers are given to the bankruptcy court. The statute declares that these are grants of jurisdiction in addition to those theretofore possessed by the bankruptcy courts. 11 U. S. C. A. 201 (Section 73). The judicial power of the United States having the capacity to receive this jurisdiction from the Congress, the bankruptcy courts may exercise it if a person of the class designated seeks to invoke it by proper petition filed in good faith.

No good faith is required in ordinary bankruptcy; the debtor's unexempt property is vested in a trustee for the benefit of his creditors; he is discharged from his provable debts; and nothing further is expected of him with respect to his former indebtedness; but sections 74 and 75 are intended to compose the debts and rehabilitate the debtor, either with or without an adjudication. In the latter instance, in the absence of good faith or the hope of rehabilitation, the proceeding is futile, and the law will not do an idle thing, especially since it will not help the debtor, and

will hinder and delay the creditors. Sections 73, 74, and 75 are in one act, were passed at the same time (47 Stat. 1467), and should be construed together as the Congress was dealing with the whole subject at the same time, as indicated in 75 (r) which includes section 74 in its definition of a farmer.

The status of the debtor is not changed under the amendment of his petition and his adjudication in bankruptcy under section 75 (s). This is shown by section 75 (n), which provides that upon the filing of the petition the debtor-farmer subjects himself and his property to the exclusive jurisdiction of the court, and that such jurisdiction shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed. Therefore, the filing of the amended petition asking to be adjudged a bankrupt did not take away the power of the court to dismiss the petition (if not filed in good faith) expressly granted under section 74 (a) and impliedly brought forward in section 75 by paragraph (i) of the latter section.

Notice to creditors is not necessary before dismissal of the original or amended petition. The statute does not require it, because the jurisdiction being exercise is primarily for the relief of debtors. Herein is another difference between the two procedures. The procedure in ordinary bankruptcy, where the rights of creditors are considered first, is incompatible in many respects with the beneficent procedure in recent legislation accorded distressed debtors. The basis for a contrary view may be found in the contention that, while the court might have dismissed the original petition herein without notice to creditors, it did not do so, but approved the same, and that the order of approval is *res judicata*. This contention readily gives way upon examination. First, the approval was upon the *ex parte* application of appellant, who did not file the petition or amendment thereto in good faith and may not complain of its dismissal. Second, no one was prejudiced by the dismissal, not even appellant, because, in the absence of good faith or hope of rehabilitation, he is not entitled to a stay,

or to retention of possession of his property after adjudication, or to an equity of redemption after a sale thereof, or to the other benefits of the liberal legislation intended for the relief of debtors in an economic emergency. Third, the bankruptcy court is always open; it has no terms fixed by law, and may review an order of this kind at any time before the proceeding is finally closed.

We have seen that every individual seeking a composition with creditors must file a petition in good faith or the court has power to dismiss it, and should do so under section 74 (a), without notice to creditors. What reason can be urged for exempting a farmer from this requirement? Upon what principle of justice should a farmer who has no hope of rehabilitation be permitted to delay or hinder creditors with a sham proceeding for composition or extension of his debts? Good faith and hope of rehabilitation are not unusual requirements, and it is inconceivable that the Congress intended a discrimination in this respect when it was dealing with farmers and other individuals at the same time and in the same act: H. R. No. 14,359, for the relief of debtors. 47 Stat. 1467. Therefore, the only reasonable construction of the act is that a farmer is a person entitled to file a petition under either section 74 or 75, and a petition under either section may be dismissed for lack of good faith. This view is confirmed by subsection (i) of section 75, which requires confirmation of the proposal by the court if "the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or act herein forbidden." This statute itself is enough to show the intent of Congress, even if a farmer is not a person entitled to file a petition under section 74 (a) which may be dismissed by the court, for want of good faith, without notice to creditors.

Since the appellant has given no indication of a desire to become an ordinary bankrupt, and since the ruling of the majority is that neither good faith nor hope of rehabilitation is essential to an adjudication upon the amended petition, which entitles him to invoke the court's emergency jurisdiction intended especially for the relief of debtors, I dissent, with deference, from the order overruling the petition for a rehearing.

Appendix "E".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8758.

In the Matter of JOHN BEVERLY HENDERSON, *Debtor*,

PETITION FOR COMPOSITION AND EXTENSION.

In Forma Pauperis.

Appeal from the District Court of the United States for the Eastern District of Texas.

(December 22, 1938.)

Before Hutcheson, Holmes, and McCord, Circuit Judges.

HOLMES, *Circuit Judge:*

Appellant, John Beverly Henderson, filed his petition praying that he be allowed to effect a composition or extension under the provisions of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203). At the first meeting of creditors, called by the conciliation commissioner to whom the petition was referred, he proposed a plan of conciliation and extension, but presented no acceptances from any of his creditors and obtained none at that time. No order was entered fixing the time within which a plan might be presented, and the matter lay dormant for sixty-one days, whereupon the conciliation commissioner certified the facts with a recommendation that the petition be dismissed. On the recommendation of the supervising conciliation commissioner, the court entered an order dismissing the petition, no notice of the proposed dismissal having been given to appellant. Thereafter, and within seventy-four days after the first meeting, appellant filed his amended petition for adjudication under Section 75 (S) of the Bankruptcy Act, 11 U. S. C. A. 203 (S), and, on learning that the original petition had been dismissed, prayed that the order of dismissal be set aside and the case reinstated.

The matter was referred to the supervising conciliation commissioner, who held hearings on the petition and certi-

fied his findings of fact and conclusions of law, together with his recommendation that the petition be denied. The court thereupon denied the petition, and this appeal is prosecuted from the order dismissing the original petition and the order denying reinstatement.

No transcript of the testimony heard by the supervising conciliation commissioner is contained in the record, but it appears that his report and findings were adopted by the court. From these findings, it appears that, during the time elapsing between the first meeting of creditors and the filing of the amended petition, appellant took no steps to procure acceptances of the plan offered, except to communicate with one of the twenty creditors affected by the plan. It further appears that the plan offered proposed that, as to nineteen creditors, he be given a three-year moratorium on his debts, including the interest thereon, without subjecting either his person or his property to the jurisdiction of the court, and without applying his income to the payment of rent during the three years, proposing to pay only five per cent interest during the period, a smaller rate of interest than was allowed by law.

In denying the petition for reinstatement, the court found that no good-faith effort to effect a composition or extension had been made, and that appellant was not entitled to the relief provided for in Section 75 (S) of the Bankruptcy Act. *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404.

Appellant challenges the action of the court on the ground that, in the absence of an order limiting the time within which he could present a plan for confirmation, he had a maximum of ninety days, under paragraph 4 of Section L of the General Orders, and that, since this time had not elapsed, the order of dismissal was prematurely entered. It may be questioned whether or not the debtor can make this contention, since it is implied in the General Orders that such time as is allowed by the court will be on his application, and the absence of such allowance results from an absence of a request therefor; and for the further reason that he is charged with notice of the various steps taken in the proceeding, which includes the reports of the conciliation commissioner and the supervising conciliation commissioner. *Cf. Massey* v. *Farmers & Merchants Nat. Bank*, 94 F. (2d) 526.

In the present case, the finding of the court on the lack of good faith is not questioned, either in the briefs or in the record. The application to the court below for reinstatement of the petition was not that appellant be allowed to make a good-faith offer, but that he be allowed additional delay for the filing of a petition for adjudication under Section S. There is no apparent intention or desire to effect a conciliation or extension, but it appears that appellant's one purpose is to hinder and delay his creditors.

It has been pointed out that the relief afforded in subsection S is not an end in itself, but is ancillary to and in aid of the rehabilitation of distressed farmers, as contemplated under the preceding subsections of Section 75. The constitutionality of the section is grounded upon the principle that proceedings for the conciliation of creditors and the composition and extension of debts are within the scope of the bankruptcy provision of the Constitution. Such a proceeding may not be converted into a sham for the purpose of gaining whatever the petitioner wishes by way of procedural delays and hindrances to creditors, where no legitimate purpose of the act will be served. *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736; *Stevenson* v. *Clark*, 86 F. (2d) 330, certiorari denied, 300 U. S. 666, 57 Sup. Ct. 508, 81 L. Ed. 874; *Knotts* v. *First Carolinas*, 86 F. (2d) 551, certiorari denied, 297 U. S. 706, 56 Sup. Ct. 498, 80 L. Ed. 994; *Baxter* v. *Savings Bank*, 92 F. (2d) 709; *Massey* v. *Farmers and Merchants*, 94 F. (2d) 526, certiorari dismissed on motion of petitioner, 303 U. S. 665, 58 Sup. Ct. 761, 82 L. Ed. 732; *Sheets* v. *Livy*, 97 F. (2d) 674; *Doak* v. *Federal Land Bank*, 99 F. (2d) 145; *Cowherd* v. *Phoenix Joint Stock Land Bank*, 99 F. (2d) 225; *Bender* v. *Federal Farm Mortgage Corp.*, 99 F. (2d) 252.

The judgment of the district court is Affirmed.

Appendix "F".

HUTCHESON, *Circuit Judge*, dissenting:

I dissent. Sec. 203 (s) Title 11, U. S. C. A. without exception, limitation or qualification provides:

> "(s) Any farmer, failing to obtain the acceptance of a majority in number and amount of all creditors whose

claims are affected by a composition, and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

The majority opinion, on the authority of *Baxter* v. *Savings Bank*, 92 Fed. (2d) 404, denies this farmer this right.

In *Bartels* v. *John Hancock Mutual Life Insurance Company*, this day decided, the majority is disapproving the holdings in the *Baxter* case, that the right of the farmer to ask to be adjudged a bankrupt under Sec. (s) is qualified by, indeed is dependent upon, whether his proposition for a composition under preceding subdivisions is deemed to have been made in good faith.

For the reasons given in the majority opinion in the *Bartels* case, I respectfully dissent from the opinion of the majority, in this one.

Appendix "G".

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8949.

HERBERT B. WILSON, Administrator of the Estate of Modena Lee Wilson, Deceased, Bankrupt, *Appellant*,

Versus

ALLIANCE LIFE INSURANCE COMPANY, *Appellee*.

In Forma Pauperis.

Appeal from the District Court of the United States for the Eastern District of Texas.

(March 16, 1939.)

Before Sibley, Holmes and McCord, Circuit Judges.

HOLMES, *Circuit Judge:*

This appeal is from an order setting aside a former order of adjudication in bankruptcy under Section 75 (s)

of the Bankruptcy Act (11 U. S. C. A. 203 (s) and dismissing the proceedings, because the petition was not filed in good faith and there was no hope of rehabilitation.

During her lifetime, appellant's intestate filed her petition to effect a composition or extension of her debts, and submitted her offer at the first meeting of creditors. The offer being refused, she filed her amended petition under Section 75 (s), praying to be adjudicated a bankrupt and afforded the relief therein provided. The order of adjudication was regularly entered, and proceedings for the collection of debts and enforcement of liens were stayed in accordance with the procedure prescribed in the act. Thereafter, the bankrupt died, and appellant, having qualified as administrator, petitioned to be allowed to proceed in behalf of her estate. Appellee entered its appearance in opposition to appellant's petition, alleging that the order of adjudication was improvidently entered; that no offer of composition had been made in good faith prior to adjudication; that no feasible plan of liquidation had been submitted with the offer; that there was no reasonable hope of rehabilitation; that the land upon which appellee held a lien constituted the corpus of the estate and was worth less than the amount of the lien, leaving no equity for the estate; and prayed that the order of adjudication be set aside and the case dismissed.

On a reference to the Supervising Conciliation Commissioner, a hearing was had, after which the Commissioner found that the proposed plan of composition and extension was not made in good faith; that neither the bankrupt nor appellant had any feasible plan of rehabilitation; and that the amount of the debt to appellee was in excess of the value of the security, whereby further administration would be of no benefit to the estate. The court adopted the report of the Supervising Conciliation Commissioner, set aside the order of adjudication, and dismissed the proceeding. Relying principally upon the case of *Benno Bartels* v. *John Hancock Insurance Co.*, 100 F. (2d) 813, appellant prosecutes this appeal.

On the ground that the appeal was perfected under Section 24 (a) of the Bankruptcy Act (11 U. S. C. A. 47 (a), whereas it should have been under Section 24 (b) (11

U. S. C. A. 47 (b), appellee moves to dismiss the appeal. Since the record is sufficient to present questions of law which are determinative of the controversy, the motion to dismiss will be overruled, and the appeal will be allowed as if brought under Section 24 (b) for the consideration of the questions of law only. *Baxter* v. *Savings Bank of Utica*, 92 F. (2) 404, 405, and cases cited.

Accepting the finding that the offer was not made in good faith and that there is no reasonable hope of rehabilitation, as we must on this appeal, appellant's contention is reduced to the proposition that the district court was without authority to set aside the adjudication and dismiss the proceeding, but was bound to continue the stay provided for or to liquidate according to the procedure and subject to the limitations provided for in the act. Following what we conceive to be the correct interpretation of the case of *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, we have held that good faith and a reasonable hope of rehabilitation in the proceedings leading to, as well as in making, the offer of composition and extension under Section 75 of the Act (11 U. S. C. A. 203 (a)-(r) are necessary prerequisites to the benefits provided under subsection (s) (11 U. S. C. A. 203 (s). *Baxter* v. *Savings Bank of Utica, supra*, 92 F. (2), 404, 406; *In re John Beverly Henderson*, 100 F. (2) 820.

As to the contention that the authority to dismiss does not exist in the district court, because not expressly conferred by the act, it should be noted that the general bankruptcy act contains no provision authorizing a dismissal for fraud or lack of jurisdiction. It is true that the bankruptcy court is limited in its jurisdiction, being created by statute; but, even so, it is a court of equity, within its sphere, and may protect itself from being used as an instrument of hindering and delaying creditors when the debtor, in filing the petition, was acting in bad faith and without hope of rehabilitation. To let the adjudication stand in such circumstances would be to sanction the continuation of an unwarranted imposition upon the jurisdiction of the court.

Furthermore, the petition to be adjudged a bankrupt under 75 (s) is merely an amendment to the prayer of the

petition for a composition and extension under 75 (a)-(r), as to which there is express statutory authority to dismiss because not filed in good faith. The argument of appellant is reduced to this: that, although there is statutory authority to dismiss the original petition for lack of good faith, this authority is lost when the prayer of the petition is amended by asking to be adjudged a bankrupt, even though the prayer is amended under a separate paragraph of the same act.

Added to the principle that the law will not do an idle thing, we have, then, to support the action of the court in dismissing the petition and amendment thereto: 1, the inherent power of a court of bankruptcy to protect its jurisdiction from abuse; 2, the express statutory power to dismiss the original petition under Section 75 (a)-(r) for lack of good faith, the prayer only of the petition being amended under paragraph (s); 3, the construction of the act by the supreme court in *Wright* v. *Vinton Branch, supra*, upholding its constitutionality on the ground that the bankruptcy court has the power to put an end to the proceedings, if not filed in good faith; 4, the opinion of Mr. Justice Brandeis, that relief under 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Section 75 (a)-(r), followed by his statement that "if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under Section 75 cannot be expected to have any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset." 300 U. S. 462. If further implication of power is needed, it is found in 75 (i), which provides that the court shall confirm the proposal if satisfied that the offer and its acceptance are in good faith.

The judgment of the district court is Affirmed.

Appendix "H".

SIBLEY, *Circuit Judge*, concurring:

In the case of John Beverly Henderson, 100 Fed. (2d) 820, the farmer-debtor under Sect. 75 of the Bankruptcy Act had not been adjudicated a bankrupt. In the case of

Benno Bartels, 100 Fed. (2d) 813, he had been adjudicated. The present case falls directly under the latter decision, for Modena Wilson had been adjudged a bankrupt for about two years when the secured creditor on motion got a revocation of the adjudication and a dismissal of the proceedings. I persist in thinking the exposition of the law in the Benno Bartels case to be correct. Section 74 and Section 75 are not to be construed together as composite legislation. Each is a separate scheme to be distinguished from the other. In Section 74 any person not a corporation, whether in or out of bankruptcy, may petition in good faith and obtain the provided relief. Subsection (1) provides for an adjudication in bankruptcy of the debtor if the proceeding was commenced or prolonged for the purpose of delaying creditors or delaying an adjudication, or if confirmation of his proposal is denied, except that in the case of a farmer he must consent to adjudication. Section 75 sets up a more elaborate organization, including conciliation commissioners, and it applies only to farmers. It contains several provisions which are repetitions of what was enacted in Section 74, but this only shows that the two are independent of one another and one includes nothing merely because it is in the other. Under Section 75 the farmer-debtor who fails to obtain the consent of his creditors to his plan of extension is not liquidated as of course, as the debtor under Section 74 (1) is, but Subsection (s) permits him without any conditions whatever to amend his petition and ask to be adjudged a bankrupt. When that is done he is a voluntary bankrupt, and comes under the general bankruptcy law, except as Subsection (s) has modified it. The main modification is that instead of surrendering all his property at once he may on request keep it upon terms fixed and supervised by the court for three years, with a view of rehabilitating the farmer as such. He is still a bankrupt during the effort at rehabilitation. If he fails to keep the terms or it appears that he will not be able to refinance himself in three years, or if rehabilitation fails because secured creditors pursuing their rights take the farm away, the rehabilitation of course fails, but the farmer is still in voluntary bankruptcy. A secured creditor cannot dismiss the proceeding

on motion or set aside the adjudication. His right is, on sufficient grounds, to have his security abandoned to him if there is no equity for the estate, or to have the court sell it for him, or permit him to foreclose. The farmer and his other creditors are entitled to go ahead in bankruptcy on this adjudication, and the bankruptcy case can be dismissed only after notice to creditors. As in the Benno Bartels case, so in this, the secured creditor, while he might have asked a release or a sale of his security by the court for the reasons he urged, had no standing to have the adjudication set aside and the case dismissed.

Nevertheless, in the circumstances here disclosed, this erroneous action did no one any harm. The secured creditor gets opportunity to foreclose on his security. There is no equity in it and no other estate, and no possible benefit to the slight unsecured indebtedness in continuing the bankruptcy. The debtor herself was dead and a discharge would do her no good. While the regular course would have been to abandon the farm to the secured creditor, and to close the estate without a trustee because there are no assets, the course taken accomplishes the same thing. Because no injury was done anyone I concur in affirming the judgment.